matter by whom planted.[16] It is submitted that the distinction drawn between *fructus industriales* when severed and other things, including *fructus naturales,* severed from the realty, is proper. Crops are largely the result of the care and labor put upon them and do not in any serious measure injure the freehold. It is just, therefore, that the owner should recover only the net gain.[17] On the other hand, where things are severed to the permanent injury or depreciation in value of the freehold, there is no reason why ownership should be changed by the disseisor's wrongful act, and they should be recoverable to the same extent as any other objects of property. The principal case does not make it clear whether or not the court follows this rule, though a suggestion that it does may be found in the court's reference to a possibility of suit by the plaintiff after the termination of the adverse possession.

C. E. C.

LAST CLEAR CHANCE AND CONTRIBUTORY NEGLIGENCE

The question of whether the doctrine of last clear chance is an exception to the general rule of contributory negligence is again raised by the recent case of *Ellerman Lines, Ltd. v. H. and G. Grayson, Ltd.* (1919, Ct. App.) 121 L. T. Rep. 508. In this case the defendants, ship repairers, undertook to rivet cleats to the weather deck of the plaintiff's steamer. The rivets were heated on the weather deck and carried to an open hatch, through which they were lowered in a bucket to the " 'tween" deck, where they were driven into the weather deck by a riveter. A cargo was being discharged from a hold below the " 'tween" decks, and the hatch of both the " 'tween" and weather decks being open, a cargo of highly inflammable jute was exposed through the hatches to anything falling from the weather deck. A boy in the employ of the defendants, carrying a red-hot rivet in a pair of tongs to the bucket, slipped on the deck, and the rivet fell through both hatches into the lower deck and set the jute on fire. The case was tried by the court without a jury. The court held that the defendants were negligent in doing their work in the manner described while the jute lay exposed, and (by two of the three judges) that, if the shipowners were guilty of contributory negligence (as to which the judges disagreed), then their negligence was not the proximate cause of the damage and did not prevent a recovery.

Clearly the defendants were guilty of negligence. Was the plaintiff guilty of negligence? And if so, did such negligence contribute to the injury, as an efficient cause between the parties, so as to bar a recovery by the plaintiff? The evidence showed that the plaintiff

[16] *McGinnis v. Fernandes* (1890) 135 Ill. 69, 26 N. E. 109; *Craig v. Watson* (1881) 68 Ga. 114; *Freeman v. McLennan* (1881) 26 Kan. 151.

[17] *Lindsay v. Winona, etc., Ry.* (1882) 29 Minn. 411, 13 N. W. 191.

had notice of the negligent manner in which the defendants' servants were carrying the red-hot rivets, and that the plaintiff protested against the work being done in such manner when the highly inflammable jute was exposed to danger.

Although a person is not delinquent in failing to guard against the prospective negligence on the part of another,[1] he is bound to use ordinary care to avoid a known or obvious danger; and recovery cannot be had where the party injured could have avoided the injury by the exercise of ordinary care, even though the defendant was negligent.[2]

Contributory negligence is an act or omission amounting to a want of ordinary care on the part of the plaintiff, which, concurring or co-operating with a negligent act of the defendant, is the proximate cause of the injury.[3] As is pointed out in the principal case, it is not accurate to say that a plaintiff owes a defendant a duty to use care to preserve the plaintiff's own property; but rather, "he may not recover if he could reasonably have avoided the consequences of the defendant's negligence." For in that event, as Baron Parke put it in *Davies v. Mann*,[4] "he is the author of his own wrong." In other words, a defendant under the common law is privileged to inflict injury upon a plaintiff by negligence whenever the plaintiff's own negligence is a part of the proximate cause of such injury. The comparative degrees of the negligence of the respective parties will not, in most jurisdictions, control the question of liability as they do in admiralty law and a few jurisdictions; but if the plaintiff's negligence has in any degree proximately contributed to the injury, he cannot recover.[5]

Where both the plaintiff and the defendant are negligent, if, at the last moment, both parties could have prevented the injury by the exercise of due care, or if, at such time, neither could have prevented the injury, the plaintiff's negligence bars a recovery.[6] However, the

---

[1] *Kellogg v. Chicago & N. W. Ry.* (1870) 26 Wis. 223; *Fero v. Buffalo and State Line Ry.* (1860) 22 N. Y. 209; *Holman v. Boston Land & Security Co.* (1896) 8 Colo. App. 282, 45 Pac. 519; *Tacoma Lumber & Manfg. Co. v. City of Tacoma* (1890) 1 Wash. 12, 23 Pac. 929.

[2] *Nicholas v. Tanner* (1903) 117 Ga. 223, 43 S. E. 489; *Salem Bedford Stone Co. v. O'Brien* (1895) 12 Ind. App. 217, 40 N. E. 430; *Murphy v. Deane* (1869) 101 Mass. 455.

[3] *Cf. Wastl v. Montana Union Ry.* (1900) 24 Mont. 159, 61 Pac. 9; see *St. Louis S. W. Ry. v. Casseday* (1899) 92 Tex. 525, 527, 50 S. W. 125.

[4] (1842, Exch.) 10 M. & W. 545, 548.

[5] *Pennsylvania Ry. v. Righter* (1880, Sup. Ct.) 42 N. J. L. 180; *Wilds v. Hudson River R. R.* (1862) 24 N. Y. 430; *Weaver v. Pennsylvania R. R.* (1905) 212 Pa. 632, 61 Atl. 1117.

[6] *Tobin v. Omnibus Cable Co.* (1893, Calif.) 34 Pac. 124; *Butler v. Rockland T. & C. St. Ry.* (1904) 99 Me. 149, 58 Atl. 775. But see *contra, Christen v. Macon Ry. & Light Co.* (1904) 120 Ga. 314, 47 S. E. 923.

party who last has a clear opportunity of avoiding the injury, is considered, as between the parties, solely responsible, notwithstanding the negligence of his opponent.[7] This is the original statement of the rule which is now known as the doctrine of last clear chance. It is said that this rule simply furnishes a means of determining whether the plaintiff's negligence is a remote or a proximate cause of the injury, that before the introduction of the rule, any negligence on the part of the plaintiff, which in any degree contributed to the injury, was treated as a proximate cause, and constituted contributory negligence, which barred recovery.[8] It is apparent that the doctrine in this form is not an exception to the general doctrine of contributory negligence, as has been often thought to be the case.[9] But the negligence of the defendant, if it intervenes between the negligence of the plaintiff and the injury, is, as between the parties, the sole proximate cause of the injury, and the plaintiff's antecedent negligence is merely a condition or remote cause, and hence not contributory. It should be made clear that it is only when, at the last momont, the defendant could, and the plaintiff could not, by using due care, have avoided the injury, that a plaintiff has a right to recover despite his own negligence.

In the instant case, it seems clear that at the last moment, the plaintiff, by taking reasonable care, could have avoided the consequences of the defendants' negligent conduct, just as the defendants could have prevented the injury at the last moment by devising some less dangerous method of bringing the hot rivets to the man who was driving them into the deck. In other words, this is not a case where at the last moment the defendants, and the defendants only, could by the exercise of reasonable care, have prevented the injury; but it is a case of the concurrent negligence of the plaintiff and the defendant continuing up to the last moment. Thus the judge below and the dissenting judges in the Court of Appeal appear to have reached a more satisfactory conclusion of fact than did the majority of the Court of Appeal.

The decision of the majority serves to emphasize the inadequacy of the statement of the rule contained in Lord Penzance's famous opinion in *Radley v. London & N. W. Ry.*[10] "Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the

---

[7] *Davies v. Mann* (1842) 10 M. & W. 546.

[8] See *Smith v. Norfolk & S. R. R.* (1894) 114 N. C. 728, 750, 19 S. E. 863.

[9] See *Keefe v. Chicago & N. W. Ry.* (1894) 92 Iowa, 182, 186, 60 N. W. 503; *Mapes v. Union Ry.* (1900) 56 App. Div. 508, 514, 67 N. Y. Supp. 358; COMMENT (1915) 24 YALE LAW JOURNAL, 330.

[10] (1876, H. L.) 35 L. T. Rep. 637.

plaintiff's negligence will not excuse him."[11] This statement glosses over the requirement that the defendant, and the defendant only, must have had the last clear chance to entitle the plaintiff to recover. This requirement is strongly insisted upon by Salmond,[12] and Pollock,[13] and quite properly. A failure to observe this stringent requirement has apparently led the court into error in the principal case.

RECENT DECLARATORY JUDGMENTS

The current law reports in England and elsewhere disclose a number of cases in which declaratory judgments have been rendered under circumstances in which the majority of our courts would, under present practice, have been unable generally to grant any relief. The useful results achieved in these cases seem to warrant a brief comment upon them.

Perhaps the most interesting is an English case involving a request for a declaration of privilege by the plaintiffs who claimed that a certain sum payable by the British Admiralty in respect of a requisitioned ship lost while in Government service belonged wholly to them as owners of the ship and that the defendants, the charterers, had no right to share in it.[1] The ship had been let by the plaintiffs to the defendant charterers in 1914 for a period of eight years, under a condition that if she was lost hire was then to cease from the day of her loss. In 1917 she was requisitioned by the Admiralty under terms that if she were lost by war risks, compensation would be made on her ascertained value. Shortly afterwards she was sunk by the enemy. The defendants notified the Admiralty that they had an interest in any sums payable, whereupon the plaintiffs brought this action for a declaration that the defendants had "no right" to any compensation and that the sum payable belonged to the plaintiffs exclusively. It will be observed that the plaintiffs here had no "cause of action" against the defendants. They merely asserted the defendants' "no right" and their own freedom from a duty to share with the defendants the Admiralty award (i. e. a privilege). Much the same problem was involved in the celebrated case of *Guaranty Trust Co. v.*

---

[11] *Ibid.*, 638.

[12] Salmond, *Torts* (4th ed. 1916) 44, 45.

[13] Pollock, *Law of Torts* (10th ed. 1916) 489.

[1] *London-American Maritime Trading Co. v. Rio de Janeiro T. L. & P. Co.* [1917] 2 K. B. 611. Indirectly of course, the plaintiff asserts a right to the money and to all of it, but this right is against the Government and not against the defendant. The plaintiff also asserts the defendant's no-right against the Government as well as his future no-right against the plaintiff after the plaintiff collects the money from the Government. The suit was doubtless brought incidentally to advise the Admiralty as to its duties, although not *res judicata* as to it.